

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In Re:

HELENE L. KROCHALIS,

CASE NO. 93-21162

Debtor.

Peter Scribner, Trustee,

Plaintiff,

A.P. NO. 94-2090

vs.

**Helene L. Krochalis, Thomas W.
Krochalis, and Robert W. Krochalis,**

DECISION & ORDER

Defendants.

BACKGROUND

On May 18, 1993, Helene L. Krochalis (the “Debtor”) filed a petition initiating a Chapter 7 case.

On her Schedule F, the Debtor listed ten entities holding unsecured non-priority claims aggregating \$80,004.27, including a claim held by Ignatius St. George (“St. George”) which was: (1) scheduled in the amount of \$61,697.27; (2) designated as being for money loaned; and (3) further designated as fixed and liquidated. However, on June 24, 1993, the Debtor filed an Amended Schedule F which designated the claim held by St. George as disputed.

On August 6, 1993, after three other Chapter 7 Panel Trustees had recused themselves, Peter Scribner was designated by the Office of the United States Trustee as the Debtor’s Chapter 7 Trustee

(the "Trustee"). The Minute Report of a Section 341 hearing conducted by a prior trustee on June 18, 1993, at which the attorney for St. George appeared, stated that: "New Trustee should investigate possible fraudulent conveyance." The Minute Report of a Section 341 hearing conducted by the Trustee on September 10, 1993 indicated possible assets in the nature of "potential fraudulent transfer", and stated that: "Creditor to file proof of claim; Debtor to object; If claim is upheld, Trustee may pursue fraudulent transfer; Otherwise, if claim is rejected (Debtor claims it was a gift, not a loan), transfer probable was not fraudulent". On October 13, 1993, the Trustee advised the Court that the Debtor's Chapter 7 case appeared to be an "asset case", and requested that the Clerk's Office send the Debtor's creditors a notice to file claims.

On September 30, 1993, St. George filed an unsecured non-priority claim with the Bankruptcy Court (the "St. George Claim") in the amount of \$58,697.27. The Claim indicated that the indebtedness due was incurred on seven separate dates over the period from March 3, 1987 through December 15, 1988.

On October 20, 1993, an Objection to the St. George Claim was filed on behalf of the Debtor (the "Claim Objection") on the basis that all of the monies St. George transferred to the Debtor were gifts.

On October 20, 1993, the Trustee forwarded a letter (the "Trustee Opposition") to the Court, the then attorney for the Debtor, the attorney for St. George and the Office of the U.S. Trustee, which indicated his opposition to the Claim Objection and stated that:

"My understanding of the facts of the case is that the debtor was being sued in state court by this creditor when this case was filed. At that time, the debtor transferred her interest in her house to her children for no consideration. These facts suggest that

the debtor was attempting to transfer proeprty [sic] in defraud of a creditor. Such behavior implies that the debtor considered the St. George transaction to be a debt rather than a gift.”

After various submissions were made and discovery completed by the attorneys for the Debtor and St. George, an Evidentiary Hearing was conducted by the Court on January 26, 1994, at which the Trustee made a brief appearance to indicate that he was not going to participate in the hearing but was interested in its outcome, since it would be an important factor for him to consider in determining whether he would be commencing an adversary proceeding for the recovery of a prepetition transfer by the Debtor. At the time of the Evidentiary Hearing, the Court: (1) granted a motion filed on January 21, 1994 by the then attorneys for the Debtor to withdraw as her attorneys for the non-payment of fees; and (2) based upon all of the evidence then before it and the presumption contained in Rule 3001(f) of the Rules of Bankruptcy Procedure, allowed the St. George Claim when the Debtor failed to go forward and present any additional evidence. On February 4, 1994, the Court entered an Order (the “Allowance Order”) allowing the St. George Claim.

On February 9, 1994, after the Debtor had engaged a new attorney (the “Attorney for the Debtor”), the Debtor appealed the Allowance Order to the United States District Court for the Western District of New York (the “District Court”).

On September 16, 1994, the Trustee commenced an Adversary Proceeding (the “Adversary Proceeding”) against the Debtor and her sons, Thomas W. Krochalis (“Thomas Krochalis”) and Robert W. Krochalis (“Robert Krochalis”). On September 23, 1994, the Trustee filed an Affirmation of Service indicating that on September 22, 1994, he had served a copy of a Summons and an

Amended Complaint (the “Amended Complaint”)¹ upon each of the defendants at 81 Wyndham Road, Rochester, New York (“Wyndham Road”) and upon the Attorney for the Debtor. The Amended Complaint set forth a single first cause of action under 11 U.S.C. Section 548, 11 U.S.C. Section 544 and New York Debtor and Creditor Law Section 270, et seq. The Amended Complaint included allegations that: (1) upon information and belief between January 1, 1989 and May 1, 1989, St. George, either directly or through his attorney, had written one or more letters to the Debtor demanding the repayment to him of \$35,000.00 which he had advanced to the Debtor prior to May, 1989; (2) on or about May 16, 1989, within four years prior to the commencement of the case, the Debtor transferred to Thomas and Robert Krochalis a two-thirds interest in Wyndham Road, retaining a one-third interest, by a deed recorded in the Monroe County Clerk’s Office on May 16, 1989; (3) upon information and belief, the Debtor had received no consideration in exchange for the transfer of the interest in Wyndham Road evidenced by the deed recorded on May 16, 1989; (4) on or about January 10, 1992, within two years prior to the commencement of the case, the Debtor transferred to Thomas and Robert Krochalis her previously retained one-third interest in Wyndham Road by a deed recorded in the Monroe County Clerk’s Office on January 16, 1992; (5) upon information and belief, the Debtor had received no consideration in exchange for the transfer of the interest evidenced by the deed recorded on January 10, 1992; (6) each of the deeds indicated that no transfer tax was paid when it was recorded; (7) upon information and belief, St. George had served

¹ Since the initial Complaint served by the Trustee was designated “Amended Complaint”, this Decision which involves the Trustee’s motion to amend his complaint may be somewhat confusing.

a Summons and Complaint upon the Debtor in a State Court action in May, 1989; (8) upon information and belief, the total value of the Wyndham Road property which was transferred to Thomas and Robert Krochalis by the two deeds attached to the Amended Complaint was in excess of \$75,000.00, and there were no mortgage liens against the property; and (9) the transfers of the Debtor's interest in Wyndham Road were fraudulent as to the Trustee and could be avoided by him pursuant to the provisions of Section 548 and Section 544.

The Amended Complaint respectfully requested that: (1) an order be entered avoiding the above described transfers pursuant to 11 U.S.C. Sections 548 and 544 and New York Debtor and Creditor Law Section 270, et seq.; and (2) an order be entered requiring the defendants to turn over to the Trustee the real and personal property so transferred, or its reasonable value in the amount of \$75,000.00, together with interest from the date of the transfers, plus costs, disbursements, and attorney's fees incurred in connection with the Adversary Proceeding.

On October 18, 1994, the Attorney for the Debtor, on behalf of the Debtor and Thomas and Robert Krochalis, interposed an Answer (the "Answer"), which: (1) set forth a number of specific denials; (2) set forth a number of affirmative defenses, including that the allegations of avoidability pursuant to Section 548 were without merit because the transfers had occurred more than one year prior to the filing of the Debtor's Petition; pursuant to the Court's Decision in *In re Anderson* (Bankr. W.D.N.Y. 1992), the Debtor was entitled to a \$10,000.00 homestead exemption offset in the event that the Trustee's Section 544 causes of action were successful and either or both of the transfers were found to be avoidable, since the transfers had occurred more than one year prior to the filing of the Debtor's Petition requiring that the Trustee proceed only under Section 544 and New

York State law; the Debtor received consideration for each of the transfers; and the Debtor was not insolvent at the time of the transfers; and (3) asserted that in the interests of judicial economy, further proceedings in the Adversary Proceeding should be suspended until the Debtor's appeal of the Allowance Order was decided.

The Court's notes of pretrial conferences conducted by the Court on November 29, 1994, December 20, 1994 and February 21, 1995 reflect that the parties indicated to the Court that they were attempting to negotiate a settlement of the Adversary Proceeding and were attempting to determine the value of Wyndham Road and the abilities of the defendants to make settlement payments. At the request of the parties, the Court continued to adjourn the Adversary Proceeding without further substantive pretrial conferences until a decision was issued by the District Court on the Debtor's appeal of the Allowance Order.

On November 29, 1995, the Allowance Order was vacated by the District Court and the case was remanded for further proceedings. At the request of the parties, the Court continued to further adjourn the Adversary Proceeding until an evidentiary hearing on the Claim Objection was completed.

At a May 16, 1996 Evidentiary Hearing on the Claim Objection, the Court heard the testimony of the Debtor and St. George. In his testimony, St. George acknowledged that during the period from March 3, 1987 through December 15, 1988: (1) the Debtor was his best and most trusted friend; (2) he had made many gifts to the Debtor (in cash, by check or by payment to third parties) totaling in excess of \$12,000.00; (3) specifically on April 8, 1988, he had executed a new Last Will and Testament which after making several specific gifts totaling \$6,500.00, left all the rest, residue

and remainder of his estate to the Debtor; and (4) he had converted many of his bank and deposit accounts to accounts in his name and in trust for the Debtor, including a First Federal certificate of deposit issued on October 5, 1987 in the original principal amount of \$20,000.00 and a Goldome certificate of deposit issued on August 22, 1988 in the original principal amount of \$20,000.00.

However, in his testimony, St. George also indicated that he had made a number of loans to the Debtor during that period which she had understood were loans and which she had agreed she would pay back to him when she was financially able, including: (1) \$12,000.00 representing two checks which St. George used to pay off a second mortgage on the Debtor's residence, 81 Wyndham Road, Rochester, New York, held by Carl Voldman (the "Voldman Mortgage"); (2) \$3,859.27 representing a check which St. George paid to GMAC on June 23, 1987 to pay off the Debtor's car loan (the "GMAC Loan"); and (3) \$7,838.00 representing two checks which St. George paid to Eastway Lincoln Mercury in May, 1988 to purchase a 1988 Subaru automobile titled in the Debtor's name.

In addition, in his testimony, St. George indicated that by checks dated December 6, 1988 (\$5,000.00), December 15, 1988 (\$9,500.00) and December 15, 1988 (\$20,500.00), he had agreed to invest with the Debtor in, or make a loan to her so that she could acquire, a Sylvan Learning Center franchise for the Naples, Florida area. He further testified that when the Debtor failed to obtain the franchise she failed to return the funds to St. George, even though he had demanded that they be returned.

At the Evidentiary Hearing, the Debtor testified that she: (1) had never requested that St. George pay off the Voldman Mortgage, pay off the GMAC Loan, or purchase the new Subaru for

her; (2) had never agreed to repay the amounts which St. George voluntarily, and as gifts, expended to pay off the Voldman Mortgage, pay off the GMAC Loan and purchase the Subaru; (3) believed that the \$35,000.00 which St. George had given her to acquire a Sylvan Learning Center franchise in Florida was also a gift, intended by St. George to obtain a school so as to provide her with a means of obtaining a stable income in expectation of their relationship continuing on a long-term basis; and (4) did not believe that if she did not obtain the Sylvan Learning Center franchise she had any obligation to return the funds obtained from St. George or otherwise repay him, notwithstanding his immediate demand for repayment.

On July 11, 1996, the Court filed a Decision & Order (the "Final Claim Decision") which disallowed the St. George Claim in the amount of \$35,000.00 only, together with interest from March 3, 1987. On July 19, 1996, the Debtor appealed the Final Claim Decision to the District Court.

At a September 17, 1996 pretrial conference conducted by the Court in the Adversary Proceeding, the Trustee and the Attorney for the Debtor indicated that: (1) they were still discussing a possible settlement of the Adversary Proceeding; and (2) it did not appear that further discovery was necessary. In response to the Court's concern that the parties were in agreement on the issues to be presented at trial, there was a discussion of the disputed issues, including: (a) any consideration that may have passed between the defendants; (b) the possible insolvency of the Debtor; (c) the saleable value of Wyndham Road; and (d) the intent of the parties at the times of the transfers, including the Debtor's possible intent to hinder, delay and defraud creditors, including St. George. At that time, the Attorney for the Debtor asserted that there had been no prior discussions or

pleadings wherein it was specifically alleged that the Debtor had made the transfers with the intent to hinder, delay or defraud creditors. At the conclusion of the September 17, 1996 pretrial conference, the Court entered an Order assigning the Adversary Proceeding to the Court's October 16, 1996 Trial Calendar.

On September 17, 1996, the Trustee forwarded a letter to the Court, the Attorney for the Debtor and the attorney for St. George. In the letter, the Trustee indicated that he believed that the Amended Complaint clearly put the defendants and the Attorney for the Debtor on notice that the Trustee intended to proceed at trial under any and all provisions of Article 10 of the New York Debtor and Creditor Law, which provided for the avoidance of fraudulent conveyances under New York Law, because in the "Wherefore Clause" to the Amended Complaint he had requested that the Court enter an order avoiding the transfers of the Debtor's interests in Wyndham Road pursuant to 11 U.S.C. Section 544 and New York Debtor and Creditor Law Section 270, et seq. The Trustee noted that the fraudulent conveyance provisions of New York State law are set forth in Article 10 of the New York Debtor and Creditor Law Sections 270 - 281. The Trustee acknowledged, however, that he did not intend to proceed at trial under Section 277 (transfers by a partnership) or 275 (transfers by a person about to incur debts) of the New York Debtor and Creditor Law. Further, the Trustee asserted that he believed that he had properly plead facts in the Amended Complaint so that the defendants and the Attorney for the Debtor were on notice that he intended to proceed under Sections 273 (transfers by an insolvent), 273-a (transfers by a defendant in a lawsuit), 274 (transfers by a person engaged in business), 276 (transfers with actual intent to hinder, delay or defraud creditors) and 276-a (attorney's fees recoverable in certain actual fraud cases) of the New York

Debtor and Creditor Law.

At the Trial Calendar on October 16, 1996, the Court set the Adversary Proceeding down for trial on December 13, 1996. At that time, the Attorney for the Debtor once again indicated that he did not believe that the Amended Complaint sufficiently plead a cause of action for intentional fraud and the recovery of attorney's fees, pursuant to Sections 276 and 276-a of the New York Debtor and Creditor Law, and that, based upon the allegations in the Amended Complaint, the Trustee could only proceed on a theory of constructive fraud under Section 273 of the New York Debtor and Creditor Law. The Court indicated to the Attorney for the Debtor that it believed that the Amended Complaint, when liberally construed as required, and in light of all of the other pleadings and proceedings in the Debtor's case, provided sufficient notice to the defendants and the Attorney for the Debtor to permit the Trustee to proceed at trial to attempt to show that the transfers in question were avoidable pursuant to Sections 273-a and 276 of the New York Debtor and Creditor Law as having been made at the time when the Debtor was a defendant in a lawsuit and with the intent to hinder, delay or defraud creditors, including St. George. The Court also pointed out, however, that there was sufficient time before the December 13, 1996 trial for either the Trustee or the Attorney for the Debtor to make whatever formal motions they deemed appropriate in connection with the assertions of the Attorney for the Debtor.

On November 13, 1996, the Trustee filed a Motion to Amend Complaint (the "Amendment Motion"), returnable December 4, 1996, which included a copy of a proposed First Amended Complaint (the "First Amended Complaint"). The First Amended Complaint set forth four separate causes of action for the avoidance of the transfers in question, as follows: (1) the first cause of action

was pursuant to Section 273 of the New York Debtor and Creditor Law; (2) the second cause of action was pursuant to Section 273-a of the New York Debtor and Creditor Law; (3) the third cause of action was pursuant to Section 274 of the New York Debtor and Creditor Law; and (4) the fourth cause of action was pursuant to Sections 276 and 276-a of the New York Debtor and Creditor Law.

On December 3, 1996, the Attorney for the Debtor filed an Affidavit in Opposition to the Amendment Motion which asserted that: (1) the First Amended Complaint now set forth four separate causes of action, as well as a request for attorney's fees included as part of the fourth cause of action, pursuant to Section 276-a of the New York Debtor and Creditor Law, rather than the single cause of action set forth in the Amended Complaint; (2) of utmost concern was the Trustee's continuing effort to attempt to avoid the transfers pursuant to Section 548, which should be stricken, because the transfers in question as plead in the Amended Complaint clearly took place more than one year prior to the filing of the Debtor's petition; (3) since the two-year Statute of Limitations provided by Section 546(a) within which trustees must bring actions to avoid transfers as fraudulent conveyances had expired, the Trustee should not be allowed to amend the Amended Complaint to include additional causes of action which would otherwise be barred by the statute of limitations contained in Section 546(a); (4) the different causes of action set forth in the First Amended Complaint do not involve the same conduct, the same transactions or the same occurrences as those set forth in the Amended Complaint; (5) "Although the two transfers involved may be the same, the basis upon which to avoid the transfers under different causes of action, involve different conduct, different occurrences, or different transactions, which were not alleged in the initial Complaint"; (6) there was nothing in the Amended Complaint which alleged that the Debtor was engaged or was

about to engage in business, so that the Trustee's allegation of having sufficiently plead an ability to prove at trial that either of the transfers in question were avoidable pursuant to Section 274 of the New York Debtor and Creditor Law was not correct; (7) nowhere in the Amended Complaint was it specifically alleged that the transfers were made with intent to hinder, delay or defraud creditors, so that the Trustee's assertion that he could proceed at trial under Sections 276 and 276-a of the New York Debtor and Creditor Law was not correct; (8) the "ad damnum clause" in the First Amended Complaint was increased over that in the Amended Complaint from \$75,000.00 to \$95,000.00; (9) the Trustee had not acknowledged the position of the Attorney for the Debtor that if there were any monetary award made by the Court, the Debtor was entitled to a credit for a \$10,000.00 homestead exemption pursuant to the Court's Decision in *In re Anderson*; and (10) the damages requested by the Trustee appeared to be in excess of the Debtor's indebtedness at the time of the transfers, which limits the amount of any monetary award which might be awarded under Section 550 or the New York Debtor and Creditor Law.

On the December 4, 1996 return date of the Amendment Motion, the Trustee acknowledged that: (1) since each of the transfers which he sought to have the Court determine should be avoided as fraudulent conveyances occurred prior to one year before the filing of the Debtor's petition, he could not seek to avoid such transfers pursuant to Section 548; and (2) since he could only proceed under Section 544 and the New York Debtor and Creditor Law, the Court's Decision in *In re Anderson* was applicable.

DISCUSSION

Except for a claim for relief to avoid the transfers in question pursuant to Section 274 of the New York Debtor and Creditor Law on the basis that they were made when the Debtor was engaged or about to engage in business or a transaction for which the property remaining in her hands after the transfers would be unreasonably small capital, the Amendment Motion is granted, and the Trustee is allowed to amend the Amended Complaint as set forth in the First Amended Complaint. Furthermore, to the extent that the First Amended Complaint actually adds claims for relief under Sections 273-a, 276 or 276-a of the New York Debtor and Creditor Law not adequately plead in the Amended Complaint, which the Court does not believe it does, such claims for relief are allowed and shall be deemed to relate back to the date of the filing of the Amended Complaint.

I. GENERAL

From the initial meeting of creditors conducted on June 18, 1993, it has been clear that the Debtor's case has been very simply about whether all or a portion of the monies transferred to her by St. George were gifts or loans, and whether the transfers of her interests in Wyndham Road to her sons, after St. George made demands on her for the repayment of what he claimed was an indebtedness, were avoidable fraudulent conveyances.

As expected, once the Court determined that St. George was a creditor of the Debtor to the extent of \$35,000.00, the Trustee commenced the Adversary Proceeding to avoid the transfers of the Debtor's interests in Wyndham Road. The Attorney for the Debtor, himself a Panel Trustee,

although not currently taking new cases, has often commenced and prosecuted adversary proceedings to avoid alleged fraudulent conveyances using the full range of grounds and remedies available under Sections 548 and 544 and Article 10 of the New York Debtor and Creditor Law. For him to suggest, in good faith, in view of the language of the Amended Complaint and the pleadings and proceedings in the Debtor's case, including the Trustee Opposition, that he was not on notice of the Trustee's intent to pursue these transfers as avoidable under any and all provisions of the New York Debtor and Creditor Law, is difficult for the Court to even begin to understand. Further, for the Attorney for the Debtor to suggest, in good faith, that the Amended Complaint did not afford him notice that the Trustee was going to proceed at trial to attempt to show that the transfers were made with an actual intent to hinder, delay or defraud creditors, including St. George, and that if so proved, the Trustee would be seeking attorney's fees, is especially difficult for the Court to even try to understand.

In addition, it is clear that, had the Court and the Trustee not accommodated the Attorney for the Debtor by suspending the adversary proceeding until a decision was made by the District Court on the Allowance Order, the Adversary Proceeding would most likely have gone to trial and all of the pleading concerns expressed would have been addressed well within the two year period provided for by Section 546(a).

Rules 8 and 9 of the Federal Rules of Civil Procedure, adopted by Rules 7008 and 7009 of the Federal Rules of Bankruptcy Procedure, provide the general rules of pleading and requirements for pleading special matters.

Rule 8(a) of the Federal Rules of Civil Procedure provides that:

Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, cross-claim, or third-party claim shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Rule 8(e)(1) of the Federal Rules of Civil Procedure provides
that:

Pleading to be Concise and Direct; Consistency.

- (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

Rule 9(b) of the Federal Rules of Civil Procedure provides
that:

Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Rule 7008(b) of the Federal Rules of Bankruptcy Procedure provides that:

Attorney's Fees. A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate.

II. CAUSES OF ACTION IN THE AMENDED COMPLAINT

The Court finds that the Amended Complaint, when liberally construed and considered together with all of the other pleadings and proceedings in the Debtor's case, including the Trustee Opposition, provided sufficient notice, as required under the Federal Rules of Civil Procedure and

the Federal Rules of Bankruptcy Procedure, to the defendants and the Attorney for the Debtor to allow the Trustee to introduce evidence under the following provisions of Article 10 of the New York Debtor and Creditor Law which provide for the avoidance of fraudulent conveyances:

- (1) The Attorney for the Debtor does not appear to contest that the Amended Complaint set forth sufficient facts and allegations which would allow the Trustee to proceed to attempt to prove that the transfers in question were avoidable pursuant to Section 273 of the New York Debtor and Creditor Law as conveyances made by a person who is or will be thereby rendered insolvent without regard to actual intent if the conveyance is made or the obligation is incurred without a fair consideration;
- (2) Section 273-a of the New York Debtor and Creditor Law provides that:

“Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages where a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.”

Whether factually correct or not, the Amended Complaint asserted a claim for relief pursuant to New York Debtor and Creditor Law Section 270, et seq. and at Paragraph 11, specifically alleged that: “Upon information and belief, St. George served a Summons and Complaint upon the Debtor in May, 1989, seeking civil damages for his claim.” Such allegations gave notice that the Trustee intended to introduce evidence to show that the transfers in question were avoidable pursuant to Section 273-a of the New York Debtor and Creditor Law;

- (3) Section 276 of the New York Debtor and Creditor Law provides that:

“Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to

both present and future creditors.”

The Amended Complaint asserted a claim for relief pursuant to New York Debtor and Creditor Law Section 270, et seq. and at Paragraph 6, specifically alleged that: “Upon information and belief, between January 1, 1989 and May 1, 1989, St. George, either directly or through his attorney, Charles Crimi, wrote one or more letters to the Debtor demanding payment of \$35,000.00. Read together with the Trustee Opposition, and the other pleadings and proceedings which took place in the Debtor’s case before May 25, 1995 when the Section 546(a) time period expired, including the pretrial conferences conducted by the Court in the Adversary Proceeding, such allegations gave notice that the Trustee intended to introduce evidence to show that the transfers in question were avoidable as having been made with an actual intent to hinder, delay or defraud creditors, including St. George; and

- (4) Section 276-a of the New York Debtor and Creditor Law provides that:

“In an action or special proceeding brought by a creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors to set aside a conveyance by a debtor, where such conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, in which action or special proceeding the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors shall recover judgment, the justice or surrogate presiding at the trial shall fix the reasonable attorney’s fees of the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors in such action or special proceeding, and the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors shall have judgment therefor against the debtor and the transferee who are defendants in addition to the other relief granted by the judgment. The fee so fixed shall be without prejudice to any agreement, express or implied, between the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors and his attorney with respect to the compensation of such attorney.”

The Amended Complaint asserted a claim for relief under Section 270, et seq. of the

New York Debtor and Creditor law and in the “Wherefore Clause”, it requested that the Court enter an order which included a request for attorney’s fees incurred herein. These allegations gave notice that the Trustee intended to request under Section 276-a of the New York Debtor and Creditor Law that the Court grant him attorney’s fees if he was successful in his claim for relief under Section 276. As the Attorney for the Debtor knows, attorney’s fees are only recoverable under Article 10 of the New York Debtor and Creditor Law pursuant to Section 276-a, which lends additional support for the assertion that the Trustee intended to proceed pursuant to Section 276 of the New York Debtor and Creditor Law.

Based on the foregoing analysis, the Court does not believe that the First Amended Complaint actually sets forth any claims for relief under Section 544 and Article 10 of the New York Debtor and Creditor Law which the defendants and the Attorney for the Debtor did not have clear notice of by reason of the Amended Complaint. The First Amended Complaint appears to the Court to simply set forth the previously sufficiently plead claims for relief under Sections 273, 273-a, 276 and 276-a of the New York Debtor and Creditor Law separately and with somewhat more particularity.

III. CLAIM FOR RELIEF UNDER SECTION 274 OF THE NEW YORK DEBTOR & CREDITOR LAW

With respect to a claim for relief pursuant to Section 274 of the New York Debtor and Creditor Law, the Court does not believe that sufficient facts and circumstances, even under a liberal construction, were contained in the Amended Complaint or in the other pleadings and proceedings in the case, which would allow the Trustee to introduce evidence to show that the transfers in question may be avoidable pursuant to Section 274 of the New York Debtor and Creditor Law. From the pleadings and proceedings in the Debtor’s case, there do not appear to be any facts which

indicate that the transfers in question, if not otherwise avoidable pursuant to Sections 273, 273-a, 276 and/or 276-a of the New York Debtor and Creditor Law, should be found to be avoidable pursuant to Section 274.

IV. VALUE OF WYNDHAM ROAD

As to the assertions by the Attorney for the Debtor that somehow the upon information and belief allegation regarding the value of Wyndham Road set forth in the First Amended Complaint (\$95,000.00), as opposed to the Amended Complaint (\$75,000.00), constitutes an impermissible amendment, the fair saleable value of Wyndham Road, for purposes of Section 271 of the New York Debtor and Creditor Law, or its value, for purposes of an award under Section 550(a), must be determined by the Court from the evidence produced at trial, notwithstanding the Trustee's allegations of value. The Trustee's pleadings in the Amended Complaint and First Amended Complaint as to the value of Wyndham Road and the request in his "ad damnum clauses" are sufficient to allow him to introduce evidence at trial with respect to the fair saleable value or value, as appropriate. Furthermore, the defendants will also be able to introduce evidence of value.

V. ADDED CAUSES OF ACTION, IF ANY, AND RELATION BACK

To the extent that the First Amended Complaint actually adds claims for relief not sufficiently plead in the Amended Complaint, in my discretion, I will allow the amendment, and, in accordance with the law and analysis (even though it relates to a Section 523(a) cause of action) set

forth in the Decision & Order of this Court in *In re Rodriguez*, (Bankr. W.D.N.Y. 1993), a copy of which is attached, find that the amendment relates back to the date of the Amended Complaint. It appears that there has been no undue delay or dilatory motive on the part of the Trustee in not originally including any necessary allegations of such claims for relief, and there is no undue prejudice to the defendants, because: (1) they had sufficient notice of the transactions and occurrences involved from the Amended Complaint and the other pleadings and proceedings in the Debtor's case; and (2) together the defendants have full and complete knowledge of all of the related facts and circumstances in connection with the transfers in question.

CONCLUSION

Except for a claim for relief to avoid the transfers in question pursuant to Section 274 of the New York Debtor and Creditor Law on the basis that they were made when the Debtor was engaged or about to engage in business or a transaction for which the property remaining in her hands after the transfers would be unreasonably small capital, the Amendment Motion is granted, and the Trustee is allowed to amend the Amended Complaint as set forth in the First Amended Complaint. Furthermore, to the extent that the First Amended Complaint actually adds claims for relief under Sections 273-a, 276 or 276-a of the New York Debtor and Creditor Law not adequately plead in the Amended Complaint, which the Court does not believe it does, such claims for relief are allowed and shall be deemed to relate back to the date of the filing of the Amended Complaint.

I consider the Answer to have adequately denied all appropriate allegations contained in the Amended Complaint and the First Amended Complaint, so that it is unnecessary, as far as the Court

IT IS SO ORDERED.

Dated: December 6, 1996